

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW SARAMPOTE,

Defendant-Appellant.

UNPUBLISHED

January 13, 2005

No. 237031

Wayne Circuit Court

LC No. 00-007169-01

Before: Talbot, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (person at least thirteen years of age and under sixteen years of age). The trial court originally sentenced defendant to concurrent terms of seventy-one months to fifteen years' imprisonment. However, in response to defendant's motion for resentencing, defendant was resentenced to concurrent terms of fifty-seven months to fifteen years' imprisonment. We affirm.

Defendant first argues that he was denied his right to a fair trial because the trial court denied his request to excuse an allegedly biased potential juror, Juror 18, for cause. During voir dire, Juror 18 indicated that, at a young age, she had been the victim of a pedophile. Upon further questioning, she opined that, despite this experience and the fact that hearing the present case would be emotional for her, she nonetheless could be fair and impartial. Defense counsel then challenged Juror 18 for cause, but the trial court denied defendant's challenge, and Juror 18 remained on the jury during the trial. Defendant now contends that, during voir dire, Juror 18 expressed "a state of mind that [would] prevent the person from rendering a just verdict," and that she was "interested in a question like the issue to be tried," both grounds for dismissal for cause under MCR 2.511(D)(4) and (13).

This Court reviews for abuse of discretion a trial court's rulings on challenges for cause based on bias. *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000); *People v Roupe*, 150 Mich App 469, 474; 389 NW2d 449 (1986). We defer to the trial court's superior ability to assess a prospective juror's demeanor to determine whether the person would be impartial. *Williams*, *supra* at 522. In *People v Lee*, 212 Mich App 228, 248-249; 537 NW2d 233 (1995), this Court further explained:

A four-part test is used to determine whether an error in refusing a challenge for cause merits reversal. There must be a clear and independent showing on the record that (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable.

See also *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228, 251; 445 NW2d 115 (1989); *People v LeGrone*, 205 Mich App 77, 81-82; 517 NW2d 270 (1994).

In this case, the record does not support defendant's claim that Juror 18 should have been disqualified for cause. There is no indication that Juror 18 was anything but fair and impartial in her verdict. Any question whether Juror 18 was able to render a just verdict, despite her prior unfortunate experience, was answered when she told the court that she could be fair. A juror will not be excused for cause if the court is satisfied that the juror does not entertain a bias or opinion so as to influence her verdict as a juror. MCL 768.10. "A juror who expresses an opinion referring to some circumstances of the case which is not positive in character, but swears he can render an impartial verdict, may not be challenged for cause." *Roupe, supra* at 474.

Defendant claims that the court's decision was arbitrary because the court later excused another potential juror for cause after she revealed she also had been molested as a child. However, unlike Juror 18, the other juror indicated on the record that she could not be fair and impartial and clearly displayed a state of mind that would have prevented her from rendering a fair verdict. The trial court, thus, did not abuse its discretion in declining to excuse Juror 18 for cause after she indicated she could be fair and impartial, despite her traumatic past.

Defendant's argument further fails because he did not exhaust all of his peremptory challenges at voir dire. *Lee, supra*. After the parties excused two jurors, narrowing the panel to twelve, the court asked the defense if they had any more challenges to the panel. Despite the fact that Juror 18 was plainly still sitting on the panel, defense counsel indicated, "Your Honor, we have no challenges." The record indicates that the trial court did not deny the defense the opportunity to exhaust all their challenges, and, by declining to make any more challenges, the defense indicated its satisfaction with the twelve jurors who had been impaneled. Moreover, the record indicates that, after the court announced that a jury had been selected, defendant made no further objection to the jury panel and in no manner indicated dissatisfaction with Juror 18 or any of the other jurors. Defendant evidently chose not to exhaust his peremptory challenges because he was satisfied with the jury as selected. Thus, defendant's failure to exhaust his peremptory challenges forecloses his claim that he was denied a fair trial due to the trial court's refusal to excuse Juror 18 for cause. Clearly, defendant has not shown any actionable prejudice. *Lee, supra*; *LeGrone, supra*.

In a related argument, defendant contends that his trial counsel was ineffective for failing to exercise a peremptory challenge to excuse Juror 18 and for his failure to object to the purportedly prejudicial and irrelevant testimony of certain prosecution witnesses. Because defendant did not raise this ineffective assistance of counsel claim in an appropriate motion in the trial court, our review is limited to mistakes apparent on the record. *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998); *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that counsel made an error so serious that he was prejudiced by the error in question, i.e., the error might have made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "We evaluate defense counsel's performance from counsel's perspective at the time of the alleged error and in light of the circumstances." *People v Grant*, 470 Mich 477, 487; 684 NW2d 686 (2004). This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Thus, where counsel's conduct involves a choice of strategies, it is not deficient. *LaVearn*, *supra* at 216.

As previously noted, the record fails to establish that Juror 18 should have been dismissed for cause. Because counsel is not required to make a futile challenge, *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000), defendant has failed to show that trial counsel was ineffective for not excusing Juror 18 with a peremptory challenge. Further, to the extent that trial counsel made a strategic decision not to peremptorily challenge this juror, defendant has failed to overcome the presumption of sound trial strategy. *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999); *People v Robinson*, 154 Mich App 92, 94-95; 397 NW2d 229 (1986).

Defendant also claims that trial counsel was ineffective for failing to object to the testimony of prosecution witness Mary Budzinski. During direct examination, the prosecution attempted to question Budzinski about defendant's behavior toward her, apparently to show that defendant had a predatory and obsessive nature that also was evident in the circumstances of the present case. The trial record reflects that defense counsel objected to this questioning, and the court prevented the prosecution from proceeding with those questions. On cross-examination, defense counsel questioned Budzinski in further detail about her claims that defendant had threatened her. Although it was the defense that introduced specific allegations of defendant's threatening behavior into evidence, we will not second guess defense counsel's apparent strategy of introducing such evidence in order to benefit the defense, i.e., to discredit her, portray her as a person out for revenge, and to color her as a woman scorned. *Rockey*, *supra*.

Defendant also claims that trial counsel was ineffective for failing to object to the testimony of Jason Gorski that the victim had told defendant that she was only fifteen years of age. Even assuming *arguendo* that this hearsay testimony was erroneously admitted, the error, if any, was harmless, and defendant was not prejudiced because the same information was admitted into evidence through other sources. Similarly, trial counsel's failure to object to Gorski's assumption, gleaned from the circumstances and not direct observation, that defendant and the victim had sex is, for similar reasons, without merit. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy which this Court will not review with the benefit of hindsight. *Rockey*, *supra* at 77. Defendant has failed to overcome the presumption that counsel's manner of handling these witnesses was sound trial strategy, and no prejudice is evident.

Next, defendant claims that he was denied a fair trial due to numerous instances of prosecutorial misconduct. Here, defendant did not preserve some of his challenges to the prosecutor's conduct by objecting at trial. In *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), this Court explained:

This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Concerning preserved issues of prosecutorial misconduct, this Court evaluates the challenged conduct in context to determine if the defendant was denied a fair and impartial trial. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Thus, to avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings. *Carines, supra* at 763-764; *Schutte, supra* at 720.

While it is improper for a prosecutor to vouch for the credibility of facts and evidence not in the case, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), prosecutors "are accorded great latitude regarding their arguments and conduct," *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), and are not required to articulate their arguments in the blandest possible terms. *Aldrich, supra* at 112. "Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *Schutte, supra* at 721. "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Id.* "Otherwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel." *Id.* Finally, no error requiring reversal will be found if the prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *Id.*

Defendant claims the prosecutor committed misconduct by purposely eliciting hearsay testimony and inflammatory information from the witnesses. Defendant refers to the matters of hearsay and threatening behavior previously mentioned in his ineffective assistance of counsel claim. Defendant also protests the prosecutor's elicitation of hearsay testimony regarding the victim's age – a crucial issue in this statutory rape case. The trial court allowed this testimony over a defense objection. However, defendant has not demonstrated prejudice from the admission of this challenged testimony. As previously noted, testimony that the victim told defendant her age was admitted through witnesses other than Gorski and Budzinski. Budzinski's testimony about her relationship with defendant was used by the defense to characterize her as a person biased against defendant. Moreover, Gorski's testimony inferring that defendant had sex with the victim was confirmed by defendant's later admissions at trial. Thus, defendant's claims that he was denied a fair trial due to prosecutorial misconduct are without merit.

In his supplemental brief, defendant argues that the trial court erred by failing to give a proper unanimity instruction, particularly where there were allegedly several distinct acts of sexual conduct, purportedly creating the potential for jury confusion or disagreement about the

factual basis for defendant's conviction. See, generally, *People v Cooks*, 446 Mich 503; 521 NW2d 275 (1994). However, our review of the record shows that defendant failed to request a special unanimity instruction at trial and never objected to the trial court's failure to provide one. Indeed, the record indicates that defense counsel expressed satisfaction with the instructions as given. Because any objection was waived, there is no error to review. See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000); *People v Hall*, 256 Mich App 674, 679; 671 NW2d 545 (2003).

Affirmed.

/s/ Michael J. Talbot
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder